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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

FEDERAL ENERGY REGULATORY COMMISSION,
Petitioner,

v.

PANHANDLE EASTERN PIPE LINE COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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OPINIONS BELOW

Respondent, Panhandle Eastern Pipe Line Company ("Panhandle") adopts the description of the opinions below contained in the Government's Petition at 2.

JURISDICTION

Panhandle adopts the statement of jurisdiction contained in the Government's Petition at 2.

QUESTIONS PRESENTED

1. Whether a Federal Energy Regulatory Commission ("Commission") order certificating new transportation service complied with the rate provisions of the Natural Gas Act when it required Panhandle to credit revenues from that new transportation customer as an offset against the cost of purchased gas so as to reduce the rates for resale gas customers, in the absence of any finding that Panhandle was receiving sufficient revenues under its existing resale customer rates to meet its costs.

2. Whether the Commission violated its own regulations by ordering Panhandle to credit revenues from new transportation service to its purchased gas cost account for resale customers.

3. Whether the Commission acted unreasonably and inconsistently, when, in a series of orders relating to Panhandle's new transportation service costs and revenues, the Commission ordered Panhandle to absorb increased costs in obtaining new transportation service, while ordering a pass-through of revenues from providing a similar new service to transportation customers; and required Panhandle to track decreased transportation costs, but denied tracking for parallel increases in transportation costs.

STATEMENT OF THE CASE

This petition for certiorari arises out of a decision of the United States Court of Appeals for the District of Columbia, on consolidated review of three Commission orders issued in conjunction with proceedings un-

der the Natural Gas Act.[1] Each of the Commission's orders concerned the method by which the costs of and revenues from new natural gas pipeline transportation service were to be treated in Panhandle's rates for transportation and resale customers.

Case No. 78-1356 concerned an application filed by Panhandle and its pipeline affiliate, Trunkline Gas Company ("Trunkline"), for certificates of public convenience and necessity under § 7(c) of the Natural Gas Act.[2] In the joint application, the companies proposed to provide transportation service for Libby-Owens-Ford Company ("LOF"), at a rate of $7,650 per month. The Commission granted the certificate and approved the rate proposed for the transportation services to LOF. In addition to the conditions customarily attached to transportation certificates pursuant to § 7(e) of the Act,[3] the order included a condition requiring Panhandle to credit its *transportation service* revenues to the purchased gas cost account for the company's resale gas customers. This action served to reduce the rates of the company's resale gas customers through the application of purchased gas adjustment tariff provisions ("PGA clauses").

Under the Commission's Regulations,[4] pipeline companies may elect to include in their tariffs for sales to resale customers PGA clauses, which semi-annually revise the gas purchase cost component of the resale rate to reflect all increased and decreased costs of gas

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[1] 15 U.S.C. § 717 *et seq.* (1976 & Supp. II 1978).

[2] 15 U.S.C. § 717f(c) (1976 & Supp. II 1978).

[3] 15 U.S.C. § 717f(e) (1976 & Supp. II 1978).

[4] 18 C.F.R. § 154.38 (1979).

purchased by the pipeline during the preceding six-month period. If companies so elect, they must reflect both plus and minus charges in an account designated as Account No. 191, Unrecovered Purchased Gas Costs, in the Commission's Uniform System of Accounts for natural gas companies.[5]

The PGA regulations were painstakingly formulated through an administrative rulemaking, culminating in Order No. 452 (April 14, 1972).[6] The primary motivation for the PGA mechanism was to allow companies to recover purchased gas costs, which represented "the largest single component of their cost of service." 47 F.P.C. at 1050. The regulations were intended to allow this recovery on an up-to-date basis, without the necessity of numerous, "pancaked" rate filings. *Id.*

As shown below, the Commission's regulations, as well as the terms of the PGA clauses, restrict their use to the flow-through of changes "in the cost of purchased gas."[7] The intent and effect of the inclusion of transportation revenues in the gas purchase account, without inclusion of transportation costs, is necessarily to reduce the rates of the resale customers.

Panhandle petitioned for reconsideration and rehearing, contesting the Commission's authority to impose the crediting condition in a § 7(c) certificate. Panhandle also protested the failure of the Commission to account for additional costs incurred in provid-

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[5] 18 C.F.R. § 201.191 (1979). This provision is set forth in Respondent's Appendix hereto.

[6] 47 F.P.C. 1049, *modified*, 47 F.P.C. 1510 (1972) and 49 F.P.C. 84 (1973).

[7] 18 C.F.R. § 154.38(d)(4).

ing the new service, lack of parallel provisions permitting Panhandle to automatically recover or offset new transportation costs, and discriminatory treatment. On rehearing, the Commission rejected Panhandle's challenge to the crediting order. The agency noted that if Panhandle considered it no longer earned a reasonable return under its resale customer rates, it was free to file for a general rate change under § 4(e) of the Natural Gas Act.[8] Maintaining that the crediting condition was authorized, the Commission declared that it "ensure[d] that Panhandle's resale gas customers will be the beneficiaries of the transportation revenues." Pet. App. at 106a. The Commission did, however, allow Panhandle to offset the out-of-pocket costs incurred in providing the new service against the revenues to be credited.

Case No. 78-1960 involved a related case in which Panhandle's pipeline affiliate, Trunkline, applied for a § 7(c) certificate to transport for Panhandle natural gas purchased by Panhandle from producers in Louisiana. Under the proposed arrangement, Panhandle would compensate Trunkline for its transportation service, including the amounts Trunkline would be required to pay two non-affiliate pipelines (Tarpon Transmission Company and Tennessee Gas Pipeline Company) through whose pipelines the gas would be transported prior to delivery to Panhandle. The cost to Panhandle of these payments was estimated to be between $1.5 and $2 million annually. Panhandle intervened in the Trunkline proceeding, requesting the Commission to condition Trunkline's § 7(c) certificate to allow Panhandle to charge through to its PGA clause the costs incurred by Panhandle for this trans-

[8] 15 U.S.C. § 717c (1976).

portation service, because such expenses are a necessary part of the cost of providing gas to Panhandle's resale customers. Panhandle pointed out that under the policy applied by the Commission in crediting new transportation revenues in the LOF proceeding, new transportation costs should similarly be used to offset the credit in the account. The company noted that the charging of such costs to Panhandle's cost of purchased gas account would ensure that Panhandle's resale gas customers pay their fair share of such transportation costs in the same manner as they would be the beneficiaries of the crediting of transportation revenues.

The Commission granted Trunkline's transportation certificate, but denied the relief sought by Panhandle. The Commission asserted that the revenue crediting decision was based on "short term arrangements" and was to enable the pipelines' sales customers to receive the benefits accruing from the provision of new transportation service, "since the rates that the customers pay are based on costs and revenues established in the pipelines' most recent approved rate case." Pet. App. at 115a. The Commission also rejected Panhandle's recovery of transportation costs through its PGA clause because Panhandle did not have a "tracking provision" in its tariff. The issue of crediting transportation charges to its purchased gas account, the Commission explained, could more appropriately be addressed in a Panhandle rate proceeding. Pet. App. at 114a. In response to Panhandle's complaint concerning the disparity in the treatment of transportation revenues and transportation expenses, the Commission stated, quite erroneously:

> Panhandle is not necessarily adversely affected by their inability to automatically recover the

> transportation costs because each Mcf of sales includes fixed costs. To the extent these additional volumes enable Panhandle to make sales in excess of the level used for billing determinate purposes in its rates the additional fixed cost recovery offsets the transportation costs.

Pet. App. at 116a.[9]

Panhandle requested rehearing, arguing that the Commission had acted inconsistently by requiring crediting of revenues for new transportation services in the Panhandle LOF proceeding, but barring flow-through of costs related to new transportation service in the Trunkline proceeding. Panhandle also argued that the Commission could not conclusively presume that Panhandle's outstanding resale rate schedule, established several years before, warranted the assumption that the resale customers were paying for the costs currently incurred. Indeed, Panhandle maintained that it was not recovering its cost of service, and requested a hearing to show that fact. Panhandle challenged the Commission's denial based on the lack of a tracking provision in its tariff, noting that the Commission had recently permitted other companies to track costs without formal tracking provisions. Finally, Panhandle strongly protested the Commission's clearly unfounded assumption that fixed costs contained in any additional sales would offset transportation costs. To the contrary, Panhandle demonstrated that its cost per Mcf for the additional gas supply and transportation far exceeded its highest commodity charge for

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[9] Pet. App. at 116a inadvertently omits the words beginning with "the extent" and ending at "make." For the Court's convenience, Panhandle has supplied this language from the order as set forth in the Joint Appendix before the Court of Appeals.

gas. The company indicated that it was in fact suffering losses on the order of $1,576,435 per year on its additional sales because of the Commission's unwillingness to permit recovery of the amounts paid to other pipelines for transportation services in this transaction alone.

The Commission denied rehearing, voicing the speculative fear that to allow Panhandle to recover its costs in its PGA clause "might have the effect of allowing Panhandle a rate increase when its rates, in the context of its overall cost of service, . . . might be fully adequate without such increase." Pet. App. at 120a. It sought to distinguish the precedent Panhandle had brought to its attention. In response to Panhandle's proffer of evidence refuting the Commission's assumption that Panhandle was recovering sufficient revenues, the agency stated that the appropriate manner for Panhandle to address inadequate revenues was in a full-blown § 4 rate filing. Pet. App. at 124a.

The unevenness of the Commission's treatment of transportation charges imposed upon Panhandle was further extended in Case No. 78-1630, involving two separate multi-pipeline transportation network arrangements. One arrangement resulted in an increase in the transportation rates applied by upstream pipelines to Panhandle, and the other produced a decrease in the transportation rate charged to Panhandle.

Panhandle's transportation service for Northern Natural Gas Company, a major independent interstate pipeline, requires upstream transportation by Stingray Pipeline Company, Natural Gas Pipeline Company and Trunkline Gas Company, before the gas enters Panhandle's system. Panhandle itself imposes no ad-

ditional charge for the transportation for Northern because of the proximity between the point of receipt and the point of delivery; it must, however, recover from Northern the transportation charges of the upstream pipelines. An upward charge by Stingray more than offset a rate decrease by Trunkline, resulting in a net increase in the charge imposed upon Panhandle. Panhandle attempted to pass on this net increase to Northern. In the order under review, the Commission disallowed Panhandle's attempt to recover its increased costs from Northern because of the lack of a full-blown § 4 system rate application by Panhandle.

In the same order, the Commission "waived" its regulation so as to pass through to another transportation customer of Panhandle, Central Illinois Public Service Company ("CIPSCO"), upstream rate decreases arising out of a similar transportation arrangement which had been entered into by Panhandle for the benefit of CIPSCO. Thus, in response to Panhandle's rate filing which included one pass-through decrease and another pass-through increase, the Commission rejected the increase while approving the decrease, both without examination of underlying costs.

The majority below carefully examined the relationship among these various rate and certificate orders. The court vacated and remanded to the Commission the requirement that Panhandle credit its purchased gas account for resale customers with revenues derived from new transportation service, holding the action was unauthorized by § 7 of the Natural Gas Act; violated the rate provisions of the Act and also the Commission's own regulations; lacked essential findings or any evidentiary record on which to base find-

ings; and was unreasonable. Based on Panhandle's contention that the Commission order in No. 78-1960 barring Panhandle from applying transportation costs to its PGA clause was inconsistent with its action in the revenue credit case, the court considered it unnecessary to review most of the issues in the latter case because it had remanded No. 78-1356. To the extent that Panhandle was not permitted to track increased costs in its Account No. 191, even in the absence of revenue crediting, the Commission decision in No. 78-1960 was affirmed.

Finally, in No. 78-1630, the court vacated and remanded that portion of the Commission decision denying Panhandle the right to track through additional costs paid to upstream pipelines for transportation service to Northern, and affirmed that portion approving the tracking of decreased rates to CIPSCO.

Chief Judge Skelly Wright concurred in part and dissented in part. Although he disagreed with the majority's construction of the Commission's crediting authority, he agreed that the Commission is obliged to apply evenhanded treatment to revenues and costs, and that its inconsistent treatment of those rate elements warranted remand of both Nos. 78-1356 and 78-1960. Chief Judge Wright concurred with the majority's disposition of the third case, No. 78-1630, vacating the Commission's rejection of the rate increase filing for increased upstream transportation costs. The Government has accepted that result. Pet. at 4.

REASONS FOR DENYING THE WRIT

I.

This Case Does Not Present Any Important or Novel Question of Law.

The Government asserts that "[t]his case presents an important question concerning the Commission's ability to continue to exercise its regulatory responsibilities effectively in the face of changing conditions in the natural gas industry." Pet. at 11. Elsewhere the Government again emphasizes the Commission's attempt to grapple with "changing conditions in the natural gas industry . . . ." Pet. at 12. Proper analysis of the court's holding demonstrates that the Commission's ability to adapt to changing conditions is nowhere at stake.

The Government purports to relate these cases to the natural gas shortage and its enunciated regulatory policy responding to certain concerns brought on by that shortage. Pet. at 5-6, 11-12. The policy cited by the Government, FPC Order No. 533 and its successors[10] (Pet. at 5 n.4), related specifically to transport by jurisdictional pipelines of gas purchased directly by industrial or commercial end users from certain classes of producers. Pet. at 6 n.4. Panhandle performs four basic types of transportation services: 1) for industrial customers; 2) for utility customers; 3) for customers of other pipelines; and 4) for other pipelines. None of the three cases before the Court of Appeals involved a transaction specifically addressed in the Commission Order No. 533. While one case in-

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[10] F.P.C. Order No. 533, 54 F.P.C. 821, *order on reconsideration*, 54 F.P.C. 2058 (1975).

volved somewhat similar arrangements, the other two involved more general efforts of pipelines to secure gas supplies from sources distant from their own facilities. Rather than representing components of an emergent situation, as the Government implies, the cases are more properly characterized as the typical mix of pipeline transactions undertaken by Panhandle and other pipelines.

The regulatory issue presented to the Commission, *i.e.*, Panhandle's receipt of additional revenues and payment of additional transportation costs, is unique neither to the natural gas industry, nor to the supply and demand situation that existed at that time. The revenues derived from provision of new transportation service to LOF in No. 78-1356 and others are analogous to any case in which a utility provides additional service to existing or new customers without expanding its certificated facilities. In many instances —especially the short-term transactions upon which the Commission attempted to focus in its defense of these orders (see p. 6, *supra*)—the new service simply replaces similar service which has expired. It is not the practice of the Commission to require, for example, an electric utility selling power to a new wholesale customer in place of loads which have decreased, or even in the case of sales of excess power—utilized in establishing current rates—to credit revenue from those sales to the fuel adjustment clause for other, unrelated classes of customers. Indeed, in pleadings below, Panhandle cited the recent Court of Appeals decision in *Richmond Power and Light v. FERC*, 574 F.2d 610, 620 (D.C. Cir. 1978). In that case the Commission had approved effectively the identical trans-

portation arrangement by an electric utility, and had refused to require crediting of any revenues received for such transportation.[11] Nothing any more extraordinary was presented in the Panhandle case. It is curious, therefore, that the Commission undertook to depart from long-standing agency precedent and procedure to embark upon regulatory tactics both inconsistent and unsuited to the circumstances.

In the Panhandle case, moreover, the Commission compounded the aberration by requiring Panhandle to credit these revenues to an entirely distinct and unrelated customer class, rather than to the customer class being certificated. This "rather novel crediting procedure", as the court understated (Pet. App. at 51a), was imposed in the absence of any finding by the Commission that Panhandle's existing overall revenues covered the company's overall cost of service. Instead, the Commission assumed that because the resale rates when established were found just and reasonable, that Panhandle's revenues were still adequate. Additional revenues were therefore presumed to be "excess." In view of the drastic inflationary spiral experienced in recent years, and the fact that the most recent resale rate filing had occurred several years before, a presumption that Panhandle's revenues failed to cover its cost of service would have been more supportable.

The arbitrary flavor of the Commission's deviation from its usual approach is heightened by its flat inconsistency in requiring the crediting of transporta-

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[11] In that case the Commission defended its refusal to require crediting, noting that an *ex post facto* prescription of rates would discourage voluntary industry efforts to provide new forms of service. 574 F.2d at 621 n.44.

tion revenues while refusing to examine, even in the face of a Panhandle offer of showing, a need for a pass-through of parallel new transportation costs.

One might surmise that the Commission failed to perceive the routine question posed in the LOF proceeding, *i.e.*, unanticipated revenues, because the case arose in the context of transportation services, rather than the sale of electricity or gas. If the context in which certain of the transactions arose may have been unusual, the analytical problem was not.

II.

Contrary to the Government's Assertions, the Court Did Not Hamper the Commission's Ability to Adapt to Changing Industry Conditions.

A.

The court did not abrogate the Commission's § 7 conditioning authority.

The condition imposed by the Commission was attached to a new certificate authorizing provision of new transportation service by Panhandle. Yet the condition affected not the rates imposed under *that* certificate, which ironically were approved by the Commission. Instead the condition reduced the sums collected under rates established in 1975 charged for sales of gas to previously served resale customers.

As support for its view, the Government cites Chief Judge Wright's observation that the Commission possesses authority under § 7 "to ensure that certification of a new service—such as transportation—does not create an imbalance in the pipeline company's overall profit structure." Pet. at 16, *quoting from* Pet. App. at

69a-70a. Neither the majority nor Panhandle dispute that the Commission may take into consideration a company's overall rate structure in a § 7(c) proceeding. Pet. App. at 32a. Limitations must exist, however, on specific actions the Commission may take to assure that the rate structure, as affected by a new § 7(c) certificate, continues to be in the public interest. It is true that the Commission possesses broad conditioning authority. *Transcontinental Gas Pipe Line Corp. v. FERC,* 589 F.2d 186 (5th Cir. 1979), *cert. denied,* 100 S. Ct. 1275 (1980). This power, however, is not absolute. The Commission may not impose "*any* conditions that it deems necessary." *Texaco, Inc. v. FPC,* 290 F.2d 149, 154 (5th Cir. 1961) (emphasis in original).

Thus the court below ruled that agency may not, as a condition on a § 7 certificate, require a pipeline to adjust rates previously approved by the Commission for customers not receiving the services to be certificated. Pet. App. at 25a. In so stating, the court merely required a nexus between the transaction certificated, and the transactions affected by the certificate condition imposed. On this score, the court's holding carries strong *a priori* appeal. Indeed, the Commission was willing to observe the need for such a nexus when rejecting an offset of costs against revenues "of discrete transactions". Pet. at 23. Such an approach, it claimed, mixes "apples and oranges". Pet. at 22. By crediting revenues as an offset to purchased gas costs of entirely "discrete transactions", the Commission violated its self-enunciated rule.

Attending the innate cogency of the court's logic on this point, however, were a variety of independent statutory and regulatory factors, and alternative pro-

cedures, available to the Commission. Section 5 of the Natural Gas Act [12] affords the Commission authority to institute proceedings to reduce a company's rates, if demonstrated to be "unjust, unreasonable, unduly discriminatory, or preferential." [13] A modification of the rates, however, can occur only after an inquiry, and findings by the Commission that such rates, in fact, meet one or more of those standards. As this Court has pointed out, "[t]he first prerequisite to an order [under Section 5(a)] by the Commission is that it shall be preceded by a hearing and findings." *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 583 (1942). By effectively reducing recovery from rates previously approved in a new, unrelated certificate proceeding, the Commission deftly sidestepped the procedural protections of § 5. If upheld, the court reasoned, the Commission could perpetually avoid § 5 proceedings by modifying existing, previously approved rates in new § 7 certificating proceedings. "We do not think that section was meant to reduce so sharply the role of section 5, and therefore decline to adopt FERC's expansive interpretation of the conditioning power." Pet. App. at 21a.

Similarly, by avoiding making the findings required by § 5 and instead placing the burden on Panhandle to file a § 4 rate filing to avert ensuing losses, the Commission undermined the policies contained in each of those two sections to protect regulated companies from rate instability and regulatory lag. Pet. App. at 22a. *See Algonquin Gas Transmission Co. v. FPC*, 534 F.2d 952, 956 (D.C. Cir. 1976) (Commission's use of

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[12] 15 U.S.C. § 717d (1976).

[13] 15 U.S.C. § 717d(a).

§ 7(e) conditioning authority should not be allowed to undermine § 4 protection against regulatory lag or indecision). The sums lost during the time required for a company to prepare and process a new § 4 filing are forever lost. Nor would rates approved in such a proceeding be assured, since they could be ambushed at any time by a condition imposed in an entirely distinct certificate proceeding. A finding of "just and reasonable" rates would have scant enduring quality.

Finally, the court considered the Commission's action to circumvent the § 5 requirement for a hearing and specific findings prior to the adjustment of a company's previously approved rates. *FPC v. Natural Gas Pipeline Co.*, p. 16, *supra.*

The Government, however, claims that the Commission did not adjust established "rates", but merely adjusted to maintain the existing "rate of return". Pet. at 15. It is difficult to perceive how the Commission could so argue, since it made no finding as to what the existing rate of return in fact was, and whether that return may have "wandered" somewhat since the last resale rate case. In any event, as the majority correctly explained, "this is a difference without a distinction." Pet. App. at 25a n.52. The total sum in Account No. 191 directly determines the semi-annual rate adjustment under the PGA clause. Thus, any insertion of a new factor into that account which reduces the balance results in a *pro tanto* downward adjustment to the company's rates. In the Commission's own words, allowing transportation costs to be placed in Account No. 191 "might have the effect of allowing Panhandle a rate increase . . . ." Pet. App. at 120a. *A fortiori,* crediting revenues to that Account carries the effect of a rate *decrease.*

When the court next examined the precedent proffered by the Commission for its broad reading of § 7(e), it found none supporting Commission action that "tinkered" with distinct rates provisions found just and reasonable. Pet. App. at 30a. In *Atlantic Refining Co. v. Public Service Commission of N.Y.*, 360 U.S. 378 (1959) (CATCO), cited by the Commission as precedent for its broad construction of its conditioning powers, the § 7(c) condition "held the line" on rates *charged for the certificated service in question.* In no manner did the condition reach back and modify a previously approved rate for unrelated service.

The court took great pains to remind the Commission, in conjunction with the remand, that it possessed mechanisms to effectively regulate in the changing natural gas industry. The Commission might, for example, adopt a tracker mechanism analogous to the PGA tariff clauses for transportation costs and revenues. Pet. App. at 32a. Other innovative techniques within the Commission's possession might include a "cross-refund" that would refund any collections found to be excessive in a subsequent rate proceeding. Pet. App. at 33a n.68.[14]

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[14] The Government seeks to reject the Court's suggestions, stating that agencies are not bound to any one formula for ratemaking purposes. That truism does not necessarily validate any formula which the Commission seeks to apply. Its freedom is obviously circumscribed by choice among authorized formulas. *See* p. 15, *supra*. The import of the Court's decision went no further.

B.

Alternative and compelling bases existed for the court's remand of revenue crediting.

The court's holding did not turn critically upon the Commission's § 7(c) authority. The decision likewise turned on several other adequate and independent grounds. Somewhat less complex was the court's recognition that Commission Account No. 191 regulations provide for inclusion only of "unrecovered purchased gas costs." Account No. 191, 18 C.F.R. § 201.191(A.), states:

> This account shall include purchased gas costs related to Commission approved purchased gas adjustment clauses. . . .

Resp. App. at 1a.

"Purchased gas cost", in turn, is defined by Commission regulation, 18 C.F.R. § 154.38(d)(4) n.1, and

> . . . represents the cost of wellhead purchases, field line purchases, plant outlet purchases, transmission line purchases, and pipeline production. . . .

The court correctly noted that neither transportation revenues, nor costs, are within the scope of includible items. Pet. App. at 35a.[15] Nor does the Government adequately address this ineluctable fact in its Petition. The Government noted that it was not seeking review of the Account No. 191 ruling "since the Commission can create a new account for the crediting of transportation revenues." Pet. at 9 n.7. Panhandle submits

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[15] The Court employed this same principle to affirm the Commission's disallowance of transportation costs in the PGA clause in No. 78-1960. Pet. App. at 48a.

that the court's holding on this issue was integral to the case, and of itself provided a basis for the remand of the revenue crediting issue. It should be noted, however, that the question is not simply one of the Government having "selected" the wrong account. The rate adjustment provided in the PGA clause is limited to Account No. 191, to the exclusion of all others. 18 C.F.R. § 154.38.

The most rudimentary comparison of the language in Account No. 191 and in the related regulations, with the revenues ordered credited to that account, highlights the error of the Commission's order, without necessity of further Supreme Court scrutiny.

Similar to this fundamental error was the Commission's bold refusal to base its order on any findings in the record, and to rely instead on a highly questionable assumption that vintage rates still provided revenues adequate to cover costs of service. It is black letter law that a § 7(e) condition "must be supported by soundly based findings in the record." *California Oil Company, Western Div. v. FPC,* 315 F.2d 652, 656 (10th Cir. 1963). *See also Sohio Petroleum Co. v. FPC,* 298, F.2d 465, 466 (10th Cir. 1961); *Pure Oil Co. v. FPC,* 292 F.2d 350, 352-3 (7th Cir. 1961); *Texaco, Inc. v. FPC,* 290 F.2d 149, 155 (5th Cir. 1961); *Signal Oil and Gas Co. v. FPC,* 238 F.2d 771 (3d Cir. 1956), *cert. denied,* 353 U.S. 923 (1957). To be soundly based, rate determinations require an evidentiary predicate. *See FPC v. Transcontinental Gas Pipe Line Corp.,* 423 U.S. 326, 331 (1976); *Public Service Commission of New York v. FPC,* 511 F.2d 338, 341-42 (D.C. Cir. 1975). Here there was not even a pretense of scrutiny of the relationship between revenue needs and rate levels before the rates were ordered reduced. The Commission's one-

way presumption, *i.e.*, that all revenues are excess and that all new costs are already covered, if erroneous, rendered the Commission's action "substantively incorrect." Pet. App. at 40a. The court had only to judicially notice the rising costs to pipeline companies over time to call this assumption—the only "finding" in the record—sharply into question. Pet. App. at 41a.[16]

Finally, and perhaps most glaring, was the Commission's refusal to treat costs consistently with revenues. On this score the majority and Chief Judge Wright well agreed. See Pet. App. at 44a, 54a, and 74a-77a. Panhandle offered in its Petition for Reconsideration in No. 78-1856 to work with the Commission in developing a mechanism similar to a PGA clause, that would flow through both transportation costs and revenues. In response to the Commission's "cold comfort" that Panhandle could file a § 4 change to recover new costs, the court observed:

> We think a netting procedure would be essential when both transportation costs and revenues were unanticipated—even assuming the pipeline was in other respects recovering its costs.

Pet. App. at 44a.

This line of reasoning and the accompanying remand appropriately underlay the Commission's opinion that the issues in No. 78-1960 denying Panhandle the right to charge its transportation costs to its PGA clause need no longer be addressed.

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[16] Indeed, as pointed out in the Government's Petition at 8 n.6, the deficiency which existed in Panhandle's general rate level resulted in a general rate increase filing which became effective Nov. 1, 1978—while these cases were in progress—and resulted in a major rate increase in FERC Docket No. RP78-62.

The court's decision in No. 78-1356 thus turned on a variety of separate bases, any one of which would have invalidated the Commission's action. These bases present in at least one instance nothing more than a judicial request that the Commission follow the course of its own regulations and procedures.

It should be noted that, while the Government at times embraces portions of Chief Judge Wright's opinion (Pet. at 11, 15, and 16), his overall conclusion that the Commission had penalized Panhandle and had failed to act in an evenhanded fashion harmonized with the majority. As Chief Judge Wright explained in his concurrence,

> The consequence of FERC's orders in this case are easily predictable: the pipeline companies will be reluctant to procure distant suppliers of gas, or they will file more frequent Section 4 increases. . . . Neither possibility is in the consumers' interest.

Pet. App. at 77a. More importantly, the disposition of the cases by both Chief Judge Wright and the majority were to remand to the Commission to formulate a more equitable, two-way approach. In its remand the court left the Commission with a wide latitude in which equitably to take into account new transportation revenues and costs. Nowhere has the Government shown the gravamen of the court's action as the Government describes it.

Panhandle respectfully submits that this case does not present matters warranting review by this Court, particularly as the matters were placed back in the hands of the Commission for further consideration.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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APPENDIX

RESPONDENT'S APPENDIX

191 Unrecovered purchased gas costs.

A. This account shall include purchased gas costs related to Commission approved purchased gas adjustment clauses when such costs are not included in the utility's rate schedules on file with the Commission.

B. This account shall be debited or credited, as appropriate, each month for increases or decreases in purchased gas costs with contra entries to Account 805.1, Purchased Gas Cost Adjustments.

C. After a change in a rate schedule recognizing the increases or decreases in purchased gas costs recorded in this account is approved by the Commission, this account shall be debited or credited, as appropriate, with contra entries to expense Account 805.1, Purchased Gas Cost Adjustments, so that the balance accumulated in this account will be amortized on an appropriate basis over a succeeding 6-month period or over such other periods that the Commission may have authorized. Any over or under applied debits or credits to this account shall be carried forward to the succeeding period of amortization.

D. Separate subaccounts shall be maintained for the amounts relating to the period in which the increase or decrease is accumulated and for the amortization of purchase gas increases or decreases, as applicable, so as to keep each period separate.